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No. 78-1892

In the Supreme Court of the United States

OCTOBER TERM, 1978

BART B. CHAMBERLAIN, JR., PETITIONER

v.

JEROME KURTZ, COMMISSIONER OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The sole question presented in this Freedom of Information Act (FOIA) case is whether the court of appeals correctly held that certain Internal Revenue Service documents were "specifically exempted from disclosure by statute" within the meaning of Exemption 3 of the Act (5 U.S.C. 552(b)(3)).

The pertinent facts are as follows: Petitioner brought suit under FOIA seeking disclosure of a wide range of materials compiled during an audit of his tax liabilities for various years which included criminal and civil fraud investigations of his returns for 1965 and 1966. On cross motions for summary judgment, the district court reviewed affidavits describing the documents and made an *in camera* inspection of the documents themselves. The

court then directed that some documents be disclosed in their entirety, some be disclosed in part and withheld in part, and some be withheld entirely (Pet. App. 1a-2a, 31a-47a). While the case was pending in the court of appeals, Congress substantially amended both FOIA and the Internal Revenue Code. The Government in the Sunshine Act significantly narrowed the scope of Exemption 3 of FOIA. Pub. L. No. 94-409, Section 5(b), 90 Stat. 1247. The Tax Reform Act of 1976 completely revised Section 6103 of the Internal Revenue Code (26 U.S.C.) to create a comprehensive scheme for regulating the release of tax returns and information collected to determine tax liability. Pub. L. No. 94-455, Section 1202(a)(1), 90 Stat. 1667 (Pet. App. 7a-8a).

Exemption 3 now exempts from disclosure any matters that are specifically exempted from disclosure by statute provided that such statute either (a) leaves no discretion on the issue or (b) "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3). The amended version of Section 6103 of the Internal Revenue Code generally provides that tax returns and information collected to determine liability shall be confidential. The statute then sets forth the circumstances in which information may be released to various types of interested parties, including the taxpayer himself. The statute vests in the Secretary of the Treasury the discretion to withhold certain information from the taxpayer whose taxes are at issue when the Secretary or his delegate determines that the disclosure of such information "would seriously impair Federal tax administration." Section 6103(c) (see Pet. 4-6).

In the court of appeals, the government submitted an affidavit of the Acting Commissioner of Internal Revenue stating that the bulk of the documents at issue were material covered by Section 6103 and that their disclosure

"would seriously impair Federal tax administration" (Pet. App. 8a-9a). The court of appeals held that Section 6103 satisfied the specificity requirements of Exemption 3 and found that the Commissioner had adequately demonstrated that release of the disputed documents would seriously impair federal tax administration. The court accordingly upheld the Commissioner's refusal to release the documents (Pet. App. 12a-24a).

1. The court of appeals correctly held that disclosure of the documents at issue would seriously impair federal tax administration within the meaning of Section 6103(c) and (e)(6) of the Internal Revenue Code and that the documents therefore are exempt from disclosure under Exemption 3 of FOIA.[1] Section 6103 of the Internal

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[1]Section 6103(c) provides that the Secretary of the Treasury may disclose returns and return information to the taxpayer himself or to the taxpayer's designee, unless the Secretary "determines that such disclosure would seriously impair Federal tax administration." Section 6103(e)(6) permits disclosure to such persons "if the Secretary determines that such disclosure would *not* seriously impair Federal tax administration." (Emphasis supplied.)

Thus, while "the grant of discretion to the Secretary is phrased in the negative in subsection (c) and in the positive in subsection (e)(6)" (Pet. App. 15a n.27), the court of appeals correctly observed that "the two provisions are functionally identical" (*ibid.*). In actual practice, the Internal Revenue Service has in effect adopted the procedure set out in subsection (c), *i.e.*, it permits disclosure of all return information, under circumstances otherwise sanctioned by Section 6103, absent an affirmative determination that disclosure would seriously impair tax administration.

See also *Long* v. *United States Internal Revenue Service*, 596 F. 2d 362 (9th Cir. 1979), and *Fruehauf Corp.* v. *Internal Revenue Service*, 566 F. 2d 574, 577-578 (6th Cir. 1977), holding that Section 6103 of the Internal Revenue Code is a statute within the compass of Exemption 3, although Section 6103(c) and (e)(6) were not directly in issue.

The following cases have upheld the Commissioner's refusal to disclose return information under Section 6103, but without analysis

Revenue Code is a statute within the compass of Exemption 3. As amended in 1976, Exemption 3 requires that a statute either establish particular criteria or refer to particular types of matters. As the court of appeals ruled, Section 6103 satisfies both of these tests. The criterion for the withholding of data is whether disclosure "would seriously impair Federal tax administration." Section 6103(c). Moreover, the statute applies only to a particular type of matter, "return information," which is defined as any data collected in the course of determining a taxpayer's tax liability. Section 6103(a) and (b)(2). Hence, the court of appeals correctly held that the provisions of Section 6103 are "drawn narrowly enough to avoid the evils of unfettered agency discretion with which Congress was trying to deal when it amended Exemption 3" (Pet. App. 19a).

Finally, the facts of this case amply justify the court of appeals' conclusion that disclosure of the documents sought by petitioner would seriously impair federal tax administration. As the court observed, the documents in question discuss either the facts or law relating to the fraud claim against petitioner, release of such information would doubtless be of benefit to him in preparing his defense, and the applicable provisions of Section 6103 were designed "precisely to avoid the damage to tax collection that would result from the untimely disclosure" of such information (Pet. App. 23a-24a).

2. Petitioner first argues (Pet. 13-17) that Exemption 3 does not encompass Section 6103 because the latter provision confers excessive discretion on the Secretary of

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of either subsections (c) and (e)(6) or of Exemption 3: *Anastas* v. *United States*, Civ. No. C-78-2823 (N.D. Cal. May 17, 1979); *Barney* v. *IRS*, Civ. No. 78-5100 (D. S.D. May 16, 1979); *Rizzo* v. *IRS*, Civ. No. 77-6479-Civ-JG (S.D. Fla. March 29, 1979); *Simons* v. *Semrick*, Civ. No. H-77-1487 (S.D. Tex. Aug. 18, 1978); *United States* v. *Finch*, No. 77-M-239 (D. Colo. Nov 4, 1977).

the Treasury to refuse disclosure. But the legislative history shows that Section 6103 is precisely the type of discretionary statute contemplated by Congress in enacting the amendment to Exemption 3. As an example of the type of statute that would qualify under the amended exemption, the House Committee on Government Operations cited the Atomic Energy Act of 1954, Pub. L. No. 703, Sections 141-146, 68 Stat. 940-943 (42 U.S.C. 2161-2166). H.R. Rep. No. 94-880 (Pt. 1), 94th Cong., 2d Sess. 23 (1976). The structure of that Act is similar in all material respects to the relevant portions of Section 6103 of the Internal Revenue Code. The Atomic Energy Act provides for declassification and publication of "Restricted Data" when this can be done "without undue risk to the common defense and security." "Restricted Data" is defined as any data concerning atomic weapons and special nuclear material. Other portions of the Act limit access of government employees to "Restricted Data" and provide security restrictions, just as Section 6103 provides detailed restrictions on access to "return information" as defined by Section 6103(c)-(p).[2]

3. Petitioner errs in his further argument (Pet. 18) that the decision of the court of appeals gives the Commissioner "*carte blanche* to exempt from discovery

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[2]The amendment to Exemption 3 was intended to overrule *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975). There, the Court permitted the Administrator of the Federal Aviation Administration to withhold FAA material where disclosure "is not required in the public's interest." The statute in *Robertson* permitted withholding in the absence of a showing that the "public's interest" *required* disclosure. It did not — as did the Atomic Energy Act of 1954, cited with approval by Congress in amending Exemption 3, and Section 6103 of the Internal Revenue Code — carefully define and describe the types of documents that could appropriately be withheld. Moreover, the impairment-of-tax-administration standard of Section 6103 is as specific as the "common defense and security" criterion expressly approved by Congress in amending Exemption 3. H.R. Rep. No. 94-880, *supra*.

virtually any document that he chooses." But as we have pointed out *supra*, the court of appeals upheld the Commissioner only after an independent examination of the documents themselves and of the relevant surrounding facts that showed that "the Government has established" that disclosure would seriously impair tax administration (Pet. App. 24a). Thus, there is no basis for petitioner's characterization (Pet. 21) of the "Fifth Circuit's unquestioning acceptance of the certification presented here" and his complaint that the court of appeals "abandon[ed] its judicial function to" the Acting Commissioner (*ibid.*).

4. Finally, petitioner contends (Pet. 22) that the decision below would "permit concealment of an agency's violations of its own regulations." His argument is based on the premise that the latter stages of the investigation of his tax affairs occurred only because the government hoped to find evidence of fraud in order to permit the reopening of a tax year with respect to which the statute of limitations had otherwise negligently been allowed to run. But, contrary to petitioner's suggestion, the district court found that the second referral to the Intelligence Division of the Internal Revenue Service was not made to avoid the effects of the expiration of the statute of limitations and the court of appeals found "ample support" for the district court's finding. At all events, the court of appeals correctly pointed out that, even if petitioner's allegation were true (Pet. App. 10a), "this would not transform an otherwise legal and proper investigation into an illegal inquiry."[3]

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[3]See *Irons* v. *Bell*, Civ. No. 78-1350 (1st Cir. Mar. 27, 1979) (Exemption 7 of the FOIA protected certain investigatory material from disclosure even if the investigation itself was unjustified).

Petitioner also seeks review (Pet. 27-32) of the denial of his request for an award of attorneys' fees by both courts below. But petitioner acknowledges (Pet. 31) that a few decisions "have flirted with, but rejected" his contention that a citizen who obtains disclosure of any material whatever under the FOIA (even though the data tend only, as here, to serve the claimant's narrow private interest) has acted in the public benefit for fee award purposes. See, *e.g.*, *Cuneo* v. *Rumsfeld*, 553 F. 2d 1360 (D.C. Cir. 1977), and *Blue* v. *Bureau of Prisons*, 570 F. 2d 529 (5th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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